United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 74-2681

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

RONALD RICH,

Appellant

Appeal from the United States District Court for the District of Vermont

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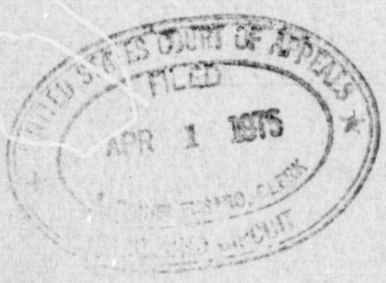
BRIEF FOR THE UNITED STATES



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BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

Ronald Rich appeals from a memorandum and order entered on November 8, 1974 in the United States District Court for the District of Vermont denying his motion to withdraw his plea of guilty.*

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*No notice of appeal was filed from the November 8, 1974 decision of the District Court. However, a notice of appeal was filed from the denial of the original oral motion to withdraw plea of guilty on September 12, 1974. This notice is dated September 20, 1974, but was received by the Court on September 26, 1974, after the expiration of the time for filing a notice of appeal as provided in Rules 4 and 25, Federal Rules of Appellate Procedure. No showing of "excusable" neglect ever was made. See Government Appendix 121. Counsel for defendant Rich have treated this as an appeal from the November 8 order.

An indictment bearing criminal no. 74-15, filed January 24, 1974, charged the defendant in ten counts with distribution of methamphetamine (Counts I, III, IV, V, VI, VII), distribution of 3, 4 - methylene-dioxy amphetamine (Count II), all in violation of § 841 of Title 21, United States Code; with the use of a communications facility in committing the knowing and intentional distribution of a quantity of methampheta-mine, in violation of §§ 841 and 843 of Title 21, United States Code (Count VIII); with conspiring with ten named co-conspirators to distribute and import into the United States large quantities of methamphetamine over the period May 1, 1971 through October 18, 1973, in viola-tion of §§ 846 and 963 of Title 21, United States Code (Count IX); and with engaging in a continuing criminal enterprise over the period May 1, 1971 through October 18, 1973 through violations of §§ 812, 841, 846, 952, 960 and 963 as alleged in Counts I - IX of the indictment, which violations were part of a continuing series of violations of said statutes undertaken in concert with at least five other persons with respect to whom Ronald Rich occupied a position of organizer, supervisor and manager and from which Ronald Rich obtained substantial

income and resources in violation of § 848 of Title 21 of the United States Code (Count X). (DA 1a - 8a).*

Rich originally was charged in three indictments filed October 25, 1973 in criminal number 73-77, distribution of methamphetamine; criminal number 73-76, conspiring with two other individuals to distribute methamphetamine and two substantive counts of distribution of methamphetamine; criminal number 73-75, conspiring with two additional individuals to distribute methamphetamine and two substantive counts of distribution of methamphetamine. The indictment in criminal number 73-77 was superseded by an indictment filed October 21, 1973, criminal number 73-89, which charged Rich with conspiring with six other persons to distribute methamphetamine and with two substantive counts of distribution of methamphetamine. A further indictment filed on October 31, 1973, criminal number 73-91, charged Rich with conspiring with his wife to distribute methamphetamine and other controlled substances and with

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* DA refers to Defendant's Appendix. Other references are as follows: GA - Government's Appendix; Tr. - Transcript.

three counts of possession with intent to distribute and distribution of controlled substances. All of these indictments were superseded as to defendant Rich only by an indictment filed on January 24, 1974 in criminal number 74-15. A notice of dangerous special drug offender pursuant to 21 U.S.C. § 849 was filed in criminal number 74-15 on January 28, 1974.

Rich entered a plea of guilty to four counts of the indictment, Counts III, VI, VIII and IX, in criminal number 74-15 on May 9, 1974.*

A hearing was held on September 9, 1974 on the application of the dangerous special drug offender statute, 21 U.S.C. § 849, to this case, and on September 10, 1974 the Government withdrew this notice with the understanding that the Court would conduct a sentencing hearing. The Government presented evidence on September 10 - 11 and the Court, pursuant to the stipulation of counsel, examined certain financial records

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* A total of nine persons, in addition to Ronald Rich, were prosecuted in the various indictments for dealing in controlled substances on behalf of Rich. All nine defendants pleaded guilty and were sentenced.

showing that Rich received an unexplained $33,000 in income during a period when he was unemployed, on welfare and dealing in controlled substances. The Court also examined, pursuant to stipulation, the Grand Jury testimony of several proposed witnesses scheduled to testify against Rich.

Rich was sentenced on September 12, 1974 to a period of three years incarceration on Count VIII, to five years incarceration on Counts III, VI and IX. The sentence on Counts III, VI and IX were concurrent with each other, but consecutive to the sentence on Count VIII, for a total of eight years, all of which was to be followed by a special parole term of four years. Rich orally moved to withdraw his plea following sentencing, but the Court denied the motion from the bench. Peter F. Langrock, Esq., counsel for Rich, filed a notice of appeal* and subsequently moved to withdraw as counsel. Edward A. John, Esq. was appointed as counsel for Rich

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* The timing of this notice is discussed in the footnote on page 1 of this brief.

and filed a motion to withdraw plea of guilty on October 15, 1974, which motion was heard and testimony taken on October 21, 1974. The Court issued an opinion and order on November 8, 1974 denying the motion to withdraw plea of guilty and also denying a motion for reduction of sentence. Rich did not file a notice of appeal from this decision.

STATEMENT OF FACTS

Ronald Rich appeared before the Court on May 9, 1974 to offer a plea of guilty as to Counts III, VI, VIII and IX of the indictment, at which time he was represented by two lawyers experienced in the practice of criminal law: Peter F. Langrock, Esq.* of Langrock and Sperry, Middlebury, Vermont and Hanford Davis, Esq., a private practitioner from Brandon, Vermont. (GA 5). Mr. Langrock indicated to the Court prior to the hearing on the motion for change of plea that he had made certain representations to his client, based on "professional judgments," that he did not believe the Court would impose consecutive sentences. (GA 10 - 11). The Government specifically noted that it did not necessarily agree with Mr. Langrock's evaluation of the case and that the Government by no means concurred in the belief that consecutive sentences would not be imposed. (GA 11 - 12). The

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* Mr. Langrock has practiced criminal law in both State and federal courts for 14 years. (GA 108), and had represented Ronald Rich at various times since he was 16 years old (approximately 10 years). (GA 101).

Court very carefully went over the proposed plea with Rich and discussed the indictment and a number of related facts in detail with him. (GA 16 - 29). The Court explored Rich's relationship with his attorneys (GA 18 - 19); the possible penalty of 25 years which could be imposed in light of the dangerous special drug offender notice filed against Rich pursuant to 21 U.S.C. § 849 (GA 19 - 23); and went into a detailed discussion of the "professional judgments" rendered by Mr. Langrock. (GA 23 - 24). Rich specifically admitted his criminal involvement in each of the counts and the Court accepted the plea of guilty to all of the counts, finding that the plea was made knowingly, with full advice of counsel, that it was voluntary and that each of the pleas asserted had a basis in fact and contained all the elements of the crime charged. (GA 26 - 27).

The Court held a sentencing hearing on September 10 - 11, 1974 and heard the arguments of counsel concerning sentencing before imposing sentence on September 12, 1974. Counsel for Rich represented in the course of sentencing arguments that he had indicated to his client that "he might as well expect the maximum sentences on these counts" but he did not feel the

sentences would be imposed consecutively. (GA 58). References also was made to the Court's power to impose consecutive sentences but Mr. Langrock argued that the Court should not impose such a sentence. (GA 61 - 64).

Counsel for the United States indicated that the Government considered it inconceivable that the Court would sentence Rich to less than some type of consecutive sentence, particularly in view of sentences given others. (GA 71).

At the time of sentencing on September 12, the Court inquired of both Rich and his counsel whether there was any reason why sentencing should not take place at that time; neither indicated there was any reason. (GA 78). Rich was sentenced to a total of eight years imprisonment on the four counts and following sentencing sought to withdraw his plea of guilty. (GA 81 - 82). The Court denied the oral motion at that time. (GA 84).

Rich subsequently requested that Edward A. John, Esq. be appointed to represent him, which the Court agreed to. Mr. John filed a formal motion to withdraw plea of guilty.on October 15, 1974. The motion was heard

by the Court on October 21, 1974, at which time both Rich and one of his former counsel, Peter Langrock, testified in support of his motion.

Rich testified that at the time of his change of plea Mr. Langrock had told him that if he pled guilty he would receive a sentence of five years with the sentence on all to run concurrently, but that if he did not receive this sentence that he had the right to change his plea. (Tr. of Oct. 21 at 4). Rich further testified that he did not tell the Court of this representation from his counsel because Mr. Langrock had told him not to. Id. at 5 - 6. Rich testified upon cross-examination that he had not told the Court of the promise by his lawyer because he was concerned that the Court would not accept his plea of guilty. (GA 86 - 87). Rich further admitted that he knew he could receive up to 25 years imprisonment if the dangerous special drug offender notice was proven and that it would have been possible for him to receive this even without consecutive sentencing. (GA 87 - 88). Rich admitted that at no time during the proceedings had the Court indicated to him that it would impose a sentence of only five years, and any expectation of a five year sentence came only from his counsel. (GA 92 - 93).

Rich specifically agreed that neither the Court nor the Government had indicated to him that he could withdraw his plea nor that his sentence would be limited to five years. (GA 93). Rich agreed that he had numerous opportunities to bring the representations of his counsel to the Court's attention, but did not do so. (GA 96 - 97).

Peter F. Langrock testified generally as to the advice he had given Rich in this matter and specifically stated that he had told Rich that he did not believe a sentence of more than five years would be imposed, but that the United States Attorney's office was not willing to talk in concurrent terms but he felt the United States Attorney's office was way out of line in this respect. (GA 104). Langrock testified upon cross-examination that he was an experienced criminal lawyer who had practiced for 14 years both as a defense counsel and as a prosecutor. (GA 108). Mr. Langrock testified that he had guaranteed Rich he could withdraw his plea of guilty if he received more than five years, but he did not point to any specific case or law which was the basis for his belief that his client could do this. (GA 109 - 110). Mr. Langrock further testified that he understood that his professional judgments were not

binding on the Court and that he never intended or told Rich that the Court was bound by these representations. (GA 110a). Mr. Langrock further additionally thought that the Court would dispose of the case in accordance with his evaluation but if it did not agree with his evaluation that he assumed the Court would give his client an opportunity to return to the status quo. (GA 111).

The Court itself questioned Mr. Langrock and during this questioning Mr. Langrock admitted that he and co-counsel had never represented to Rich that their views were controlling on the ultimate disposition in the case. (GA 116 - 119).

The Court entered its opinion and order on November 8, 1974 and in its discretion denied the motion to withdraw the plea of guilty. (DA 16a - 21a).

ARGUMENT

Rule 32(d) of the Federal Rules of Criminal Procedure provides that a defendant may move to withdraw his plea of guilty only before sentence is imposed or the imposition of sentence is suspended. The rule further provides, however, that after sentencing, the Court may set aside the judgment of conviction and allow the defendant to withdraw his plea of guilty only if necessary to correct a "manifest injustice." The burden of establishing manifest injustice is upon the defendant. E.g., United States v. Lombardozzi, 436 F.2d 878, 881 (2d Cir.), cert. denied, 402 U.S. 908 (1971); United States v. Fernandez, 428 F.2d 578, 580 (2d Cir. 1970); United States v. Shailar, 202 F.2d 590, 591 (2d Cir. 1953). The District Court, which must consider all applicable factors and weigh them in making its determination, has discretion to determine whether an individual should be allowed to withdraw his plea of guilty and this determination is reversible only if clearly erroneous. E.g., United States v. Lombardozzi, 436 F.2d 828, 880 - 81 (2d Cir.), cert. denied, 402 U.S. 908 (1971); United States v. Komitor, 392 F.2d 520, 521 (2d Cir.), cert. denied, 393 U.S. 827 (1968); United States v. Giuliano, 348 F.2d

217, 221 (2d Cir.), cert. denied, 382 U.S. 946 (1965). The burden upon the defendant here, therefore, is to show that the District Court was clearly erroneous in ruling that denying Rich permission to withdraw his plea of guilty would not work a manifest injustice.

A. Ronald Rich and His Counsel Were Fully Aware that the Court Could and Might Well Sentence Rich to a Term in Excess of Five Years.

At the time Ronald Rich entered his plea of guilty to four counts of the indictment he faced a ten count indictment, including one count which required upon conviction that he be incarcerated for a term from at least ten years up to life, without any parole. (DA 8a; 21 U.S.C. § 848). He also faced eight other counts carrying five year penalties and one count carrying a four year penalty. The counts to which he pleaded exposed him to a total possible imprisonment of 19 years, however, subject to a possible penalty of 25 years if the Government proved Ronald Rich was a dangerous special drug offender under 21 U.S.C. § 849. This alone gave Rich ample reason to believe that he might well be sentenced to up to 25 years despite any present claim that he relief on his lawyer's advice that he would not receive consecutive sentences,

since he could have received 25 years on any one count under the § 849 procedures. In addition, the Court meticulously went over the applicable penalty and indicated the sentence could be either concurrent or consecutive. Mr. Rich specifically indicated he understood this. (GA 20). Further explanation was made of the application of § 849 and Rich indicated he understood he could receive up to 25 years on any given count. (GA 21).

During the plea Mr. Langrock brought up the question about his professional judgment and the following colloquy occurred:

> MR. LANGROCK: If it please the Court, I think if I may interject at this point, I don't know of anything else that is on the record except as I have indicated previously, I have given my client certain professional judgments which I believe he has considered in entering this plea at this time, but those are not promises from the officials or of the State in any way.
>
> THE COURT: Well, you understand that whatever Mr. Langrock may have voiced by way of his professional judgment has no bearing on what the Court may ultimately do in making final disposition in your case?
>
> MR. RICH: Yes, Your Honor.
>
> THE COURT: That what Mr. Langrock views, or what Mr. Davis views as to what might be the ultimate outcome in no way binds the Court and has no control as far as the Court is concerned?

MR. RICH: Well, I am pleading guilty through my lawyer's advice.

THE COURT: Yes.

MR. RICH: So, -

THE COURT: Yes, but there's been no further understanding on, - you don't understand there is anything further about what action will be taken in your case, other than what has been stated here in open court?

MR. RICH: No.

(GA 23 - 24). This particular statement shows the significant effort of the Court to ascertain whether there was any undisclosed understanding which had not been brought to the Court's attention. Since Rich categorically told the Court that there was no other understanding, he can hardly complain at this point about an understanding he purposefully refused to disclose.

After the Government had presented its factual basis in the case and following discussion of some other matters, the Court again inquired of Rich whether he desired to enter a plea of guilty:

THE COURT: Mr. Rich, having in mind the full nature of these proceedings, what's been said by the Court, by counsel for the Government and by your own attorneys, do you still wish to enter a plea of guilty to Counts 3, 6, 8 and 9 of the indictment that the Grand Jury has presented in this case?

MR. RICH: Yes, I do, Your Honor.

THE COURT: And without more of what the Court takes it that both from what you have stated here in court as well as your written request to enter a plea that you admit your involvement, criminal involvement in each of the counts that have been presented against you?

MR. RICH: Yes, Your Honor.

THE COURT: The Court will again ask the defense counsel if you know of any reason, whatsoever, why the defendant should not enter a plea of guilty to each of the counts specified in his request for (SIMULTANEOUS VOICES)

MR. LANGROCK: None other than ... (SIMULTANEOUS VOICES)

THE COURT: --for entering a plea of guilty?

MR. LANGROCK: -on the contrary, Your Honor, I have advised him that he should do so.

THE COURT: And Mr. Davis, do you concur?

MR. DAVIS: Yes, Your Honor, I gave him the same advice for the same reasons.

(GA 25 - 26).

The next proceeding before the Court took place on September 10, 1974 at which time the issue before the Court was the application of 21 U.S.C. § 849 to Rich. There was substantial discussion of the application of this section to Rich and the Government noted that it was concerned that the Court be in a position to

impose a substantial sentence without necessarily having to impose a consecutive sentence. (GA 31 - 33). Mr. Langrock opposed the application of § 849 and in the context of doing so specifically stated in the presence of his client that he understood that Rich could get up to 19 years in the Court's discretion and that the Government had agreed that the evidence it would put forth would not show the Court why it should sentence Rich to up to 25 years as opposed to 19 years. (GA 34 - 35).

The Government subsequently withdrew* its notice to dangerous special drug offender and the Court proceeded to conduct a two-day sentencing hearing. At the conclusion of the evidence presented by the Government, counsel for the defendant and the Government presented arguments to the Court for its consideration. Part of Mr. Langorck's argument consisted of argument to

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* The Government indicated, in the presence of the defendant, that a principal reason the Government was willing to withdraw its notice was because Rich, his counsel and the Court all had acknowledged the Court's power to impose consecutive sentences totalling 19 years imprisonment. Under those circumstances, the Government decided not to go through the full § 849 procedure which simply increased the exposure by 6 years to 25 years imprisonment. (GA 38 - 39).

the Court that it should not impose consecutive sentences, although at no time did he ever indicate to the Court that he believed the Court could not or would not impose such consecutive sentences. (GA 12 - 16). Mr. Langrock specifically stated that it was only his opinion that the Court would not impose consecutive sentences:

> The, you know, I, I, in this case, as I made representations to the Court and in the plea, my client realizes he might as well expect the maximum sentences on these counts, that I did not, in my opinion, feel that they would be served consecutively, but that he could expect the maximum.

(Tr. of Sept. 11, 1974 at 9)(Emphasis added).

Mr. Langrock went on to note as follows with respect to consecutive sentencing:

> The Court, as we readily recognize, has the power to impose consecutive sentences. We think, Your Honor, that that would be in violation of the congressional policy in this matter, and violative in the general sentencing policy of this Court, or any Court that I have been involved with, because I have never had a consecutive sentence issued out.

(Id. at 13). At no time did counsel or Mr. Rich ever indicate to the Court that it was their belief that Rich would be entitled to withdraw his plea of guilty

if he received a consecutive sentence. In fact in closing Mr. Langrock stated:

> We would hate to see this man who has met so many problems, which, which are not of his own making necessarily, by society, totally destroyed by a long period of sentencing.

(GA 65). This particular language of Mr. Langrock clearly indicates his intent to minimize the sentence which Rich might receive, but with the realization that the Court might well impose a longer period of incarceration as it subsequently did.

Counsel for the Government then indicated it's belief that consecutive sentences would be imposed.

> Your Honor, I have so indicated in conversations with Mr. Langrock at various times, that we would, our office would find it inconceivable that the Court would sentence Ronald Rich to less than some type of consecutive term. This is not to suggest that the Court will sentence him - Mr. Rich, to nineteen years, of course, we have no way of knowing what the Court will sentence him to, but just in terms of indicating that we have discussed this question, and our opinion of course is considerably different and we have no way of knowing what the Court will sentence him to, but nonetheless in terms of equal treatment we would find it inconceivable for him to receive a sentence of simply five years.

(GA 71)(Emphasis added). Mr. Langrock made some objection to this statement on the basis that it was a recommendation of the Government, but at no time did he do so on the basis that Rich was to be allowed to withdraw his

plea if he received a consecutive sentence. (GA 72 - 73). Mr. Rich remained silent.

Neither Mr. Langrock nor Rich indicated any reason why the Court should not impose sentence when the time came on September 12, 1974. (GA 78). It was only after having been sentenced to eight years imprisonment that Ronald Rich sought to withdraw his plea of guilty. (GA 82 - 84).

Moreover, at the time of the later hearing on the motion to withdraw plea of guilty on October 21, 1974 Rich testified that he recalled the Court stating that it was not bound by Mr. Langrock's professional judgment and could impose any sentence it deemed appropriate (GA 85 - 86); that he had misled the Court about the promise of his attorney that would be able to withdraw his plea since he wanted to be sure the Court would accept the plea (GA 86 - 87); that he knew he could receive up to 19 years on all counts and up to 25 years on any one count if the Government proved he was a dangerous special drug offender (GA 87 - 88); that the Court never told him he could change his plea if he received more than five years imprisonment (GA 92); that none of the information related to his ability to withdraw his plea came from either the

Court or the United States Attorney (GA 93); that he recalled the Assistant United States Attorney had stated in argument prior to sentencing that the Government considered it inconceivable that Rich would receive less than a consecutive sentence (GA 94 - 95); that the statement of his counsel that he would receive only five years was an opinion only and that the Court was not bound by this. (GA 96).

Peter Langrock testified that it was his professional opinion that it would be in Ronald Rich's best interest* to plead guilty and that he would not receive more than a five year sentence. (GA 104, 114 - 15). Mr. Langrock further testified that he told Rich that it was his opinion as a conclusion of law that Rich would be entitled to withdraw his plea of guilty if he received more than five years. (GA 107). Langrock further testified that his belief as to the legal conclusion was

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* Mr. Langrock testified that early in the case he came to the conclusion that it was absolutely necessary, based on the Government's case, that Rich enter a plea to whatever charges he could work out with the Government. (GA 101).

based upon his "total judgment of learning in the practice of law." (GA 110). Langrock further indicated that he had never represented to his client that the Court did not have the authority to sentence him to whatever it desired nor that the Court was in any way bound by these representations. (GA 110a, 116).

All of the above illustrates that Rich and his counsel clearly were aware that the Court could impose a period of incarceration in excess of five years and if the Government had proved that Rich was a dangerous special drug offender could impose up to 25 years on any one count. It is clear that counsel for Rich advised him that he did not believe the Court would impose a sentence in excess of five years but at no time did he indicate that the Court could not do so. The language of the Court and of the counsel for the Government illustrates that the Court clearly had in mind the possibility of consecutive sentences and the Government clearly expected consecutive sentences. However, at no time did either Rich or his counsel make any attempt to bring to the Court's or the Government's attention the belief that the plea could be withdrawn if the sentence was in excess of five years.

Rich and his counsel thereby put the Court in the impossible position of having tried to ascertain all relevant information but having it withheld by the same parties who now complain that their hidden agreement was not adhered to by the Court. The existence of the agreement in light of the statements made in court is open to some question, but assuming its existence, counsel and the defendant succeeded in rendering futile all efforts of the Court to learn the truth. Cf. United States v. Barker, 16 Cr.L.Rptr. 2521, 2522 (D.C. Cir. Feb. 25, 1975).

In addition, if this Court were to sustain Rich's argument and permit him to withdraw his plea, the Court will, in effect, allow the fulfillment of a prophesy designed to fulfill itself. The threat posed by such a decision to the administration of justice is apparent from this very case. The District Court and the Government have no defenses to this threat and a defendant and his attorney can always create a situation where the defendant's plea will be set aside at a time when the evidence of his crimes is stale or unavailable. See pp.30-33, infra. This Court should not permit such an unjust result.

B. The District Court Correctly Found That the Professional Judgment and Advice of Rich's Counsel Did Not Work a Manifest Injustice.

Rich contends that his plea of guilty was not voluntary because he did not have a full understanding of the consequences of his plea. Although this claim flies in the face of the continual statements by the Court that it could impose the maximum sentence and of the Government's statements that it expected that the Court would impose consecutive sentences as discussed infra, the alleged erroneous advice of counsel* did not work a manifest injustice upon Rich.

The Supreme Court has examined the standard to be applied to the advice of counsel relative to a decision to enter a plea of guilty and has concluded that an individual's conviction must stand where the advice given him "was well within the range of competence required of attorneys representing defendants in criminal cases." Parker v. North Carolina, 397 U.S. 790,

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* The District Court apparently felt the defendant had not met his burden on this factual allegation. In its Memorandum and Order the Court stated: "If the defendant was advised that he could withdraw his plea of guilty . . . ." (DA 19a)(Emphasis added).

797 - 98 (1970). The Supreme Court also has noted that a waiver of a trial and plea of guilty:

> entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> That a guilty plea might be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.

McMann v. Richardson, 397 U.S. 759, 770 (1970). A determination of whether the advice given was within the range of competence demanded of attorneys in criminal cases is left to the "good sense and the discretion of the trial courts. . . ." Id. at 771. The District Court found that Peter Langrock and Hanford Davis were "competent and experienced attorneys who ... [were] independently selected and retained by the defendant." (DA 18a).

Rich at the same time is claiming that he did not receive the sentence he expected, but it is axiomatic that a defendant who expects to be treated leniently and is in fact not so treated cannot claim manifest injustice based upon this. This conclusion of the Courts is based upon the theory that an individual shculd not be allowed

to test the severity of his sentence before deciding whether to maintain his plea. This Court, in United States v. Giuliano, 348 F.2d 217, 222 - 23 (2d Cir.), cert. denied, 382 U.S. 946 (1965), stated:

> To permit the withdrawal of the plea at this stage would encourage entering the plea merely as a trial balloon to test the attitude of the trial judge. This strategem has been properly condemned. (Citing, United States v. Weese, 145 F.2d 135 (2d Cir. 1944).

See Sherman v. United States, 383 F.2d 837, 840 (9th Cir. 1967); United States v. Lester, 247 F.2d 496, 501 (2d Cir. 1957).

Rich and his counsel attempted to test the severity of the sentence by not bringing to the Court's attention the expectation that Rich could withdraw his plea if not satisfied with the sentence. Only after he was sentenced to eight years rather than the five years he allegedly expected did Rich seek to withdraw his plea of guilty, in effect because he was not happy with the testing of the water.

In United States v. Parrino, 212 F.2d 919 (2d Cir.), cert. denied, 348 U.S. 840 (1954) this court noted:

> Generally in criminal cases, the defendant's surprise as to the severity of sentence

> imposed after a plea of guilty, standing alone, is not such manifest injustice as to require vacation of the judgment and permission to withdraw a plea of guilty. True, when surprise stems from a misunderstanding, reasonably entertained, of remarks by the Judge himself . . . or from assurances by the United States Attorney, it may be grounds for post-conviction relief. But surprise, as in the instant case, which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough.

Id. at 921. See Michel v. United States, Docket No. 74-219 (2d Cir. Dec. 2, 1974).

The Fifth Circuit reached a similar conclusion in Georges v. United States, 262 F.2d 426 (5th Cir. 1959). Defendant Mike Georges claimed in that case that his counsel had told him he could receive no more than a five year term of imprisonment rather than the 15 years he eventually received, an understanding which was confirmed by his counsel. The Court of Appeals upheld the denial of the motion to withdraw the plea of guilty and concluded that it is not manifest injustice when a plea results from the erroneous advice of counsel as to the penalty which can be imposed. Id. at 431.

It is significant here of course that Rich's only reliance was upon the advice of his counsel and neither the Court nor counsel for the Government in any way

misled him as to the consequences of his plea. See United States v. Napolitano, 212 F.2d 743, 745 (S.D.N.Y. 1963); Masciola v. United States, 469 F.2d 1057 (3d Cir. 1972).

The facts of this case essentially reflect an opinion of counsel, based upon his experience, of what he expected the Court would do, but with a clear understanding of what the maximum penalty was. Rich was not misled as to the maximum penalty he could receive, but rather was allegedly given the advice that the Court would allow him to withdraw his plea if the estimate proved to be inaccurate. See United States ex rel Hill v. Ternullo, Docket No. 74-2351 (2d Cir. Feb. 10, 1975).

In addition, as noted by the Court in its Memorandum and Order of November 8, 1974, Mr. Langrock's prediction was based upon his "professional judgment" that the Court would not impose consecutive sentences but with the understanding of what the maximum was. The Court on the basis of these facts, together with the failure of Rich to answer truthfully the Court's questions in this regard and the complete voir dire conducted at the time of the plea of guilty, found manifest

injustice did not result from a denial of the motion to withdraw the plea of guilty.

C. Allowing Rich to Withdraw His Guilty Plea Would Result In Substantial Prejudice to the Government.

It is appropriate for the Court to consider prejudice to the Government in making its determination of whether the defendant has met his burden of showing manifest injustice in deciding whether he is to be allowed to withdraw his plea of guilty. See, e.g., United States v. DeCavalcante, 449 F.2d 139 (2d Cir. 1971), cert. denied, 404 U.S. 1039 (1972); United States v. Lombardozzi, 436 F.2d 878 (2d Cir.), cert. denied, 402 U.S. 908 (1971); United States v. Vasquez-Velasco, 471 F.2d 291 (9th Cir. 1973). See United States v. Barker, 16 Cr.L.Rptr. 2521, 2522 (D.C. Cir. Feb. 25, 1975) (exceptionally high standard to be applied to a desired withdrawal that would substantially prejudice the prosecution).

The Government filed an affidavit with the District Court outlining the Government's experience with the case and its witnesses and explaining the difficulty expected at that late date in locating a

number of the witnesses, a factor which was particularly important here because the case depended significantly upon the testimony of former drug dealers. The unavailability of two key witnesses was also a significant factor: one had been willing to testify earlier under a grant of immunity but was at the time of the affidavit willing to subject himself to contempt of court proceedings rather than testify; the other was similarly inclined, and further was about to finish his prison sentence and return to his home in Canada where he was not amenable to subpoena. Also pervasive were the general difficulties caused by the passage of time and its potential effects on the memories of witnesses. (GA 122 - 25). The Court found the Government would be prejudiced if Rich was allowed to withdraw his plea and it is clear the Court considered this in concluding Rich had not shown a manifest injustice would be worked upon him. Memorandum and Order of November 8, 1974. (DA 20a).

The Government was prepared to go forward on this case since the return of the indictment on January 24, 1974. However, the delays brought on by the defendant and his counsel now will have served greatly their

benefit, particularly in view of the extensive proof required to show a continuing criminal enterprise under Count X, 21 U.S.C. § 848.

The integrity of the criminal justice system, both in terms of the conduct of Rich and his counsel, and the right of the public and the Government to have cases tried speedily on the basis of the best evidence, request that Rich not be allowed to withdraw his plea.

CONCLUSION

The District Court's denial of the motion to withdraw the plea of guilty should be affirmed.

Respectfully submitted,

GEORGE W. F. COOK
United States Attorney for
the District of Vermont,
Attorney for the United
States of America

JEROME F. O'NEILL
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Assistant United States
Attorneys,
Of Counsel

March 28, 1975

United States Department of Justice

UNITED STATES ATTORNEY
DISTRICT OF VERMONT
RUTLAND, VERMONT 05701

March 31, 1975

Honorable A. Daniel Fusaro
Clerk, U.S. Court of Appeals
for the Second Circuit
1702 U.S. Courthouse
Foley Square
New York, NY 10007

Re: United States v. Ronald Rich
Docket No. 74-2681

Dear Mr. Fusaro:

Enclosed for filing are 25 copies of the brief for the United States in the above-captioned case.

Two copies of the brief have been served upon Leo F. Barile, Jr., Esq.

Sincerely yours,

George W. F. Cook
United States Attorney

By: Jerome F. O'Neill
Jerome F. O'Neill
Assistant U.S. Attorney

rj
enclosures
cc: Leo F. Barile, Jr., Esq.